

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA**

DAVID SABINO QUAIR III,

Petitioner,

v.

MATT DARBY,

Respondent.

No. 1:22-cv-01142-JLT-EPG (HC)

ORDER ADOPTING FINDINGS AND
RECOMMENDATIONS, DISMISSING
PETITION FOR WRIT OF HABEAS
CORPUS WITHOUT PREJUDICE,
DIRECTING CLERK OF COURT TO CLOSE
CASE, AND DECLINING TO ISSUE
CERTIFICATE OF APPEALABILITY

(Doc. 20)

The magistrate judge issued findings and recommendations that recommended dismissing the petition without prejudice for failure to exhaust state judicial remedies. (Doc. 20.) The Court served the findings and recommendations on Petitioner, which contained a notice that any objections were to be filed within 30 days. (*Id.*) In lieu of filing objections, Petitioner filed a notice of appeal (Doc. 21.), which was dismissed for lack of jurisdiction. (Docs. 27, 28.) Before the Court are Petitioner's recently filed objections. (Doc. 30.)

According to 28 U.S.C. § 636(b)(1)(C), the Court has conducted a *de novo* review of the case. Having carefully reviewed the entire file, including Petitioner's objections, the Court concludes the findings and recommendations are supported by the record and proper analysis. Petitioner's objections consist of a collection of exhibits. Exhibit A is a copy of state habeas petition addressed to the California Supreme Court with a CIM Mailroom stamp date of February 10, 2023. (Doc. 30 at 2–6.) Petitioner appears to argue that his unexhausted claims are now

1 exhausted because after the Findings and Recommendations were issued, Petitioner submitted a
2 state habeas petition in the California Supreme Court.

3 Importantly, the Ninth Circuit observed that “[t]he appropriate time to assess whether a
4 prisoner has exhausted his state remedies is when the federal habeas petition is filed, not when it
5 comes on for a hearing in the district court or court of appeals.” *Gatlin v. Madding*, 189 F.3d 882,
6 889 (9th Cir. 1999) (internal quotation marks omitted) (quoting *Brown v. Maass*, 11 F.3d 914,
7 915 (9th Cir. 1993)). Therefore, Petitioner filing a state habeas petition in the California Supreme
8 Court *after* the findings and recommendations issued recommendations does not change the fact
9 that at the time the petition was filed, Petitioner had not exhausted his state judicial remedies.

10 Having found that Petitioner is not entitled to habeas relief, the Court now turns to
11 whether a certificate of appealability should issue. A petitioner seeking a writ of habeas corpus
12 has no absolute entitlement to appeal a district court’s denial of his petition, and an appeal is only
13 allowed in certain circumstances. *Miller-El v. Cockrell*, 537 U.S. 322, 335-36 (2003); 28 U.S.C.
14 § 2253. Where, as here, the Court denies habeas relief on procedural grounds without reaching
15 the underlying constitutional claims, the Court should issue a certificate of appealability “if jurists
16 of reason would find it debatable whether the petition states a valid claim of the denial of a
17 constitutional right and that jurists of reason would find it debatable whether the district court was
18 correct in its procedural ruling.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). “Where a plain
19 procedural bar is present and the district court is correct to invoke it to dispose of the case, a
20 reasonable jurist could not conclude either that the district court erred in dismissing the petition or
21 that the petitioner should be allowed to proceed further.” *Id.*

22 The Court finds that reasonable jurists would not find the Court’s determination that the
23 petition should be dismissed debatable or wrong, or that Petitioner should be allowed to proceed
24 further. Therefore, the Court declines to issue a certificate of appealability. Accordingly, the
25 Court **ORDERS**:

- 26 1. The findings and recommendations issued on January 5, 2023 (Doc. 20) are

27 **ADOPTED IN FULL.**

- 28 2. The petition for writ of habeas corpus is **DISMISSED WITHOUT PREJUDICE.**

1 3. The Clerk of Court is directed to **CLOSE THE CASE**.

2 4. The Court declines to issue a certificate of appealability.

3
4 IT IS SO ORDERED.

5 Dated: **March 22, 2023**


UNITED STATES DISTRICT JUDGE